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BROWN IS DEAD! LONG LIVE BROWN!: THE ENDLESS ATTEMPT TO CANONIZE A CASE

Gerald N. Rosenberg*

I welcome this Special Issue on twentieth-century constitutional history and the major article by Michael Klarman placing *Brown* in historical context. Far too much writing by legal academics obscures the larger political, social, economic, and cultural environment in which courts operate, decisions are issued, and behavior is modified. Klarman's careful and detailed analysis focuses on these crucial factors. In contrast to the artificial separation between legal analysis and work in the social sciences, Klarman's approach demonstrates the richness of genuine, multidisciplinary analysis.

In the first part of his Article, Klarman lays out the factors that fostered segregation. The argument is well-known to social scientists and Klarman does a good job reviewing and condensing the secondary literature.¹ In Part II, however, Klarman plows less cultivated fields and offers an interesting twist on the conventional claim that *Brown* set the stage for the civil rights movement and legislative action. I will focus my comments on this argument.

Klarman's aim is to understand the question of "*indirect causation*,"² in this case the relationship between *Brown* and the civil rights legislation of the mid-1960s. Rejecting the conventional wisdom that *Brown* was crucial to the creation of the civil rights movement which, in turn, successfully pressured Congress and the

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¹ For fuller treatments, see Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970* (1982); Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (1984).

² Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7 (1994).

executive for civil rights legislation,³ Klarman argues that *Brown* directly led to the election of rabid segregationists throughout the South. They, in turn, unleashed, or allowed to be unleashed, the brutal suppression of civil rights demonstrators. It was this violence, brought to the consciousness of Americans throughout the country by television, that shocked the nation and led to the enactment of civil rights legislation. Thus, Klarman concludes that *Brown* did help bring about civil rights legislation, but in a tortuous, indirect, and "perverse" manner.⁴

Klarman's attempt to find some beneficial effect from *Brown* is clever and plausible, but ultimately unpersuasive. In essence, he underestimates the deeply violent nature of Jim Crow and its defenders, and he uncritically grants important causal influence to *Brown*. Klarman is correct that television coverage of white violence inflicted on peaceful black demonstrators in the South, particularly at Birmingham and Selma, created a powerful pro-civil rights constituency in the rest of the country.⁵ He also makes a plausible case that *Brown* led to the election of segregationist public officials who either encouraged such violence or allowed it to take place. However, he does not succeed in making the case that the actions of those officials added much to the violence. Oddly, Klarman misperceives the nature of Jim Crow, presenting it as less malign than it actually was. A more accurate and critical analysis suggests that it was the actions of the civil rights demonstrators themselves in the context of an entrenched system of apartheid that led to violence. Racist public officials, propelled to public office perhaps in part because of *Brown*, raised their ugly voices, but they were overwhelmed in a cacophony of hatred. Like those

³ For a fuller treatment of the lack of evidence for *Brown*'s causal significance, see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 49-57 (1991).

⁴ Klarman, *supra* note 2, at 13. Scheingold offers a somewhat similar argument: Southern white resistance to *Brown* sparked the civil rights movement, which successfully pressured Congress and the executive. See Stuart Scheingold, *Constitutional Rights and Social Change: Civil Rights in Perspective*, in *Judging the Constitution: Critical Essays on Judicial Lawmaking* 73, 79-80 (Michael W. McCann & Gerald L. Houseman eds., 1989). While both Klarman and Scheingold focus on the resistance *Brown* engendered, their paths of causal influence differ.

⁵ For a full account of this argument, see David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*, at 133-60 (1978); Rosenberg, *supra* note 3, at 107-56.

defenders of *Brown*'s importance whom Klarman criticizes, he, too, overstates *Brown*'s influence.

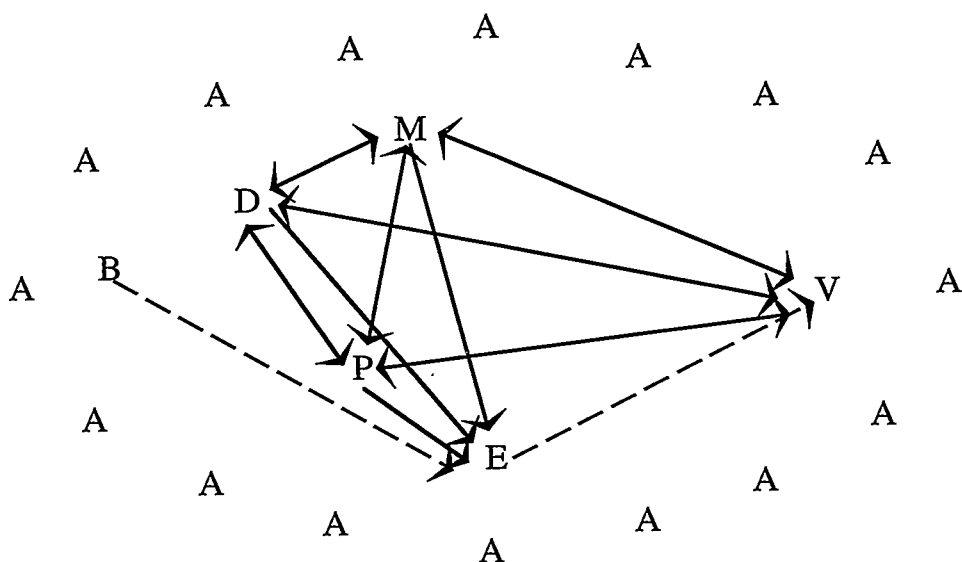
Part of the difficulty Klarman faces is that without considering alternative explanations, he can offer only a speculative story of causal influence. Putting the point, first, in somewhat abstract terms (see Figure I), in order to argue convincingly that *Brown* (B) caused later violence (V) rather than being merely correlated with it, Klarman must show that the intervening demonstrations, marches, and protests of the civil rights movement (D, M, and P) did not, by themselves, cause V.⁶ Without such a showing, Klarman is left with merely a correlation, a relationship that could have been caused by events following *Brown*. To make a persuasive case, then, he must test not only for whether *Brown* led to violence through his causal chain (B led to V), but also for whether the movement and its actions led to violence *independently* of *Brown* (events D, M, and P led to V *independently* of B). In so doing, he must explore the effects of the apartheid system (all the A's) within which all these events were occurring. For if causal connections can be made where the causal factors are independent of *Brown*, then violence and the civil rights legislation that followed from it would have occurred without *Brown*. If this is the case, as I argue it is, then whatever role *Brown* played in the election of extreme segregationists had a negligible effect on violence inflicted on civil rights demonstrators and on the ultimate enactment of civil rights legislation.

Empirical examination supports my alternate explanation. The violence Klarman finds crucial to the enactment of civil rights legislation was overdetermined. The civil rights movement *on its own* created a sufficiently violent response to pressure the federal government to act. It was not *Brown* that was "indispensable to the timing" of civil rights legislation as Klarman maintains,⁷ but rather white violence in response to the actions of the civil rights move-

⁶ This is particularly the case since Klarman has argued, in my view correctly, that *Brown* (B) did not create the civil rights movement nor lead to the actions the movement took (events D, M, and P). See Klarman, *supra* note 2, at 75-84; see also Rosenberg, *supra* note 3, at 107-56 (refuting the view that the Court and *Brown* created the civil rights movement because such a view incorrectly and unsuccessfully simplifies a complex set of events).

⁷ Klarman, *supra* note 2, at 76.

FIGURE I
WHAT CAUSED VIOLENCE DIRECTED AT CIVIL RIGHTS
DEMONSTRATORS?: KLARMAN'S EXPLANATION AND
ROSENBERG'S ALTERNATIVE



KEY: A = apartheid system
 B = *Brown* decision
 D = civil rights demonstrations
 E = local southern elections
 M = civil rights marches
 P = civil rights protests
 V = violence directed at civil rights activists
 -- = Klarman's explanation
 — = Rosenberg's alternative explanation

N.B.: Both Klarman and I reject the argument that *Brown* played an important role in leading to civil rights demonstrations, marches, and protests. Thus, no lines connect *Brown* (B) with civil rights marches (M), demonstrations (D), or protests (P). See discussion *infra* at 162-63 and note 6.

ment *independent* of *Brown*. Klarman himself notes that the depth and strength of the apartheid system meant that black demands for equal rights would be met with violent repression. It did not take *Brown* for white southerners to understand that blacks marching for civil rights posed a major threat to the status quo. They responded not to the abstract idea of equality contained in *Brown* but to the actual public demand for it. It was the civil rights movement taking to the streets that incited violence. With or without *Brown*, the events of the movement itself would have generated politicians to represent and defend the system. Thus, while Klarman makes a strong case that *Brown* heightened the rhetoric of rabid segregation, that rhetoric would have appeared as soon as blacks acted. It was the threat to the system posed by black southerners that was the main force creating the violent response. *Brown* played a role, no doubt, in encouraging such violence, but it would have happened without the Court's action. When examined in the broader perspective, *Brown* was merely a ripple in a tidal wave.

Post-Civil War southern history is full of examples of such violence directed at movements for civil rights. The unpleasant, underlying fact is that white southerners, with the help of all levels of government, constructed an entrenched system of apartheid throughout the South. Any serious challenge to that system was met with massive repression. And the most serious challenge came not from a far away capital but from the other side of the tracks when local black residents overcame their fear and publicly demanded the basic rights of American citizenship and human decency. After all, the white South had plenty of experience eviscerating federal mandates. For nearly a century it had emasculated the Fourteenth Amendment guarantee of equal protection of the law, and the Fifteenth Amendment guarantee of the right to vote, rendering them essentially empty within a full-blown apartheid system. One Court holding, on its own, posed little challenge.

White violence in response to black demands for justice is an old tactic. World War I, for example, was fought to "make the world safe for democracy," but when blacks after the war attempted to assert basic democratic rights for which they had fought and died, whites unleashed a torrent of violence. As Klarman acknowledges,

recorded lynchings increased dramatically in 1918 and 1919.⁸ And violence was not limited to the South. Woodward notes twenty-five major race riots during the last six months of 1919, some in northern cities like Chicago.⁹

The general expectation of white violence directed at proponents of civil rights is illustrated by the first Freedom Ride, the 1947 Journey of Reconciliation. No attempt was made to travel into the deep South because activists thought it would be a suicide mission.¹⁰ Indeed, when Thurgood Marshall heard of the plan he warned that "[a] disobedience movement on the part of Negroes and their white allies, if employed in the [deep] South, would result in wholesale slaughter with no good achieved."¹¹ And when the second Freedom Ride was launched in 1961, the level and brutality of the violence was extraordinary.¹² *Brown* was unnecessary to lead white southerners to violently resist civil rights.

Violence against blacks and civil rights workers was commonplace throughout the South during the civil rights movement of the 1960s. Spectacular cases such as the murder of Medgar Evers, the attacks on the Freedom Riders, the Birmingham church bombing that killed four black girls, and the murder of three civil rights workers near Philadelphia, Mississippi, are well-known. Countless other bombings and numerous murders occurred throughout the South.¹³ During the Freedom Summer of 1964, in Mississippi alone there were 35 shooting incidents, 30 bombings, 35 churches burned,

⁸ McAdam, *supra* note 1, at 89 (presenting a table of statistics reporting an increase in lynchings from thirty-six in 1917 to sixty in 1918 to seventy-six in 1919). This violence is acknowledged by Klarman, who points out that those lynched included black veterans, some wearing their uniforms. See Klarman, *supra* note 2, at 86 n.368.

⁹ C. Vann Woodward, *The Strange Career of Jim Crow* 114-15 (3d rev. ed. 1974).

¹⁰ See August Meier & Elliott Rudwick, *CORE: A Study in the Civil Rights Movement 1942-1968*, at 34 (Illini Books 1975) (1973).

¹¹ Meier & Rudwick, *supra* note 10, at 35 (quoting Thurgood Marshall).

¹² James Farmer, *Lay Bare the Heart: An Autobiography of the Civil Rights Movement* 202-03 (1985); Howell Raines, *My Soul is Rested: Movement Days in the Deep South Remembered* 113-16, 120-21 (Penguin Books 1983) (1977). See Klarman notes this as well. See Klarman, *supra* note 2, at 73.

¹³ See J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* 136, 159 (1961); Southern Regional Council, *Special Report: Law Enforcement in Mississippi* 7-17 (1964).

80 beatings, and 6 murders.¹⁴ It was a brave soul indeed who worked to end segregation in the South.

The Voter Education Project illustrates the crucial role of violence as a response to any public attempt by southern blacks to challenge segregation. Launched during the Kennedy administration, its official aim was to create local pressure for civil rights by increasing black voter registration in the southern states. The project's unofficial aim was to end civil rights demonstrations and marches that received publicity, led to violence, and pressured and embarrassed the administration. Indeed, Project participants were expressly prohibited from taking direct action, creating great debate among some groups over whether to join the Project. But both sides miscalculated, and violence often accompanied attempts at registration. For a black rural southerner to attempt to register to vote was to demonstrate an independence of spirit and a degree of courage that threatened the whole southern apartheid system in a way that unenforced Court decisions never could.¹⁵

Klarman responds that the level of both violence and racial rhetoric in the years prior to *Brown* were lower than in the 1960s. Klarman makes a strong case but it does not show a causal connection between *Brown* and racial violence. This is because there were no mass events like the Montgomery bus boycott, the sit-ins, the Freedom Rides, the large demonstrations at Birmingham and Selma, and so forth in the South in the pre-*Brown* days. Before *Brown*, southern blacks were not challenging all that was sacred to the apartheid system in a public, massive, and visceral way.

Klarman shows some awareness of the basic thrust of my position but does not integrate it into his argument. He comments that the "vast majority of southern whites in the 1950s favored racial

¹⁴ Doug McAdam, *Freedom Summer* 257-82 (1988); Garrow, *supra* note 5, at 21; Pat Watters & Reese Cleghorn, *Climbing Jacob's Ladder: The Arrival of Negroes in Southern Politics* 139 (1967).

¹⁵ For confirmation of this interpretation see Taylor Branch, *Parting the Waters: America in the King Years 1954-1963*, at 478-79 (1988); Clayborne Carson, *In Struggle: SNCC and the Black Awakening of the 1960s*, at 39 (1981); James Forman, *The Making of Black Revolutionaries* 264-65, 269 (Open Haud Publishing Inc. 1985) (1972); Herbert H. Haines, *Black Radicals and the Civil Rights Mainstream, 1954-1970*, at 156 (1988); Meier & Rudwick, *supra* note 10, at 173-75; Victor S. Navasky, *Kennedy Justice* 21, 98-99, 128 (1977); Watters & Cleghorn, *supra* note 14, at 50-55.

segregation,”¹⁶ and notes “how deeply entrenched Jim Crow remained in the heart of the deep South.”¹⁷ He points out, further, that the “timing of the *Brown* backlash depended on the white conservatives’ perception of the imminence of the desegregation threat, which turned more on events like NAACP school desegregation petitions or crises like Autherine Lucy’s attempted desegregation of the University of Alabama in early 1956 than on the *Brown* decision itself.”¹⁸ In other words, it was not the *Brown* decision but rather the visceral challenge to segregation of blacks acting in the local areas that engendered a violent response.¹⁹ Klarman does not show that such a violent response would have been absent if *Brown* had not been decided. The history of southern apartheid powerfully argues otherwise.

Klarman also notes that given the strength and depth of the apartheid system, moderate individuals, businesses, and governments were vulnerable to political and physical attack from more extreme segregationists. “Just as within a single state the black belt could pull along more moderate racial opinion, so within the South as a whole, extremist states could pressure their more moderate neighbors into conformity.”²⁰ He notes, for example, that in Arkansas many “businessmen and other racial moderates, who had resented Governor Faubus’s efforts to instigate racial discord in Little Rock, felt obliged to rally around him once Eisenhower had sent in the 101st Airborne.”²¹ But this has nothing to do with *Brown*. Given a white southern political, economic, social, and cultural system of apartheid, it did not require a Court decision to spur extreme segregationist politics and violent resistance once local blacks started their challenge. Locked in a segregationist system and culture, individuals, businesses, and governments had every incentive to support the status quo once opposing it became costly.

¹⁶ Klarman, *supra* note 2, at 106.

¹⁷ *Id.* at 74.

¹⁸ *Id.* at 98 n.419.

¹⁹ Thus, Governor Coleman of Mississippi, who served after *Brown* (1955-59), was able to oppose “some of the more extreme massive resistance measures” because there were no mass, public, civil rights actions in Mississippi at the time. Klarman, *supra* note 2, at 119.

²⁰ *Id.* at 108.

²¹ *Id.* at 110.

Given this reality, civil rights forces could pick and choose where to stage demonstrations in order to incite white violence and gain leverage against the federal government. As Garrow notes, and Klarman correctly reports, King came to realize that "unprovoked white violence aimed at peaceful and unresisting civil rights demonstrators" was "necessary for a protest to receive the national coverage, attention, and support that would help to bring about federal legislation."²² For example, demonstrations in Albany, Georgia, in late 1961 and early 1962 were considered unsuccessful because of a lack of violence.²³ The lack of violence translated into little media coverage, no pressure on the federal government, and a perceived weakening of King.²⁴ Thus, the movement increasingly searched out cities where a violent response was likely to occur. The presence of Bull Connor in Birmingham and Jim Clark in Selma made those cities attractive targets. As Klarman notes, at Selma, "[d]uring [Sheriff] Clark's initial phase of restraint, the SCLC [Southern Christian Leadership Conference] apparently contemplated moving the campaign into the countryside, where a more violent white response would be assured."²⁵ Similarly, the genesis of Freedom Summer 1964 was the knowledge that white Mississippians would respond violently to civil rights activity, as they had been doing with murderous consistency. However, it was believed that if many of the victims were northern white college students from privileged backgrounds rather than poor blacks, the nation would take notice.²⁶ Violent defense of apartheid independent of *Brown* was more than sufficient to create national revulsion and enormous pressure for civil rights legislation.

Klarman is aware of this dynamic and of the depth and strength of the segregation system. His argument is unpersuasive, however, because he is unable to differentiate the effect of *Brown* from the

²² Garrow, *supra* note 5, at 2; see also *id.* at 222, 225 (detailing the Southern Christian Leadership Conference's protest strategy and recounting Martin Luther King, Jr.'s version of that strategy); David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 171-72, 216-17, 228 (1986) (same).

²³ Garrow, *Bearing the Cross*, *supra* note 22, at 216-18. For a survey of the Albany protest, see *id.* at 173-230.

²⁴ *Id.* at 216-18.

²⁵ Klarman, *supra* note 2, at 148 n.625.

²⁶ McAdam, *supra* note 14, at 35-40. The accuracy of these understandings was quickly confirmed with the brutal murders of Chaney, Goodman, and Schwerner in June.

effect of later events and from the causal influence of the larger culture. His examples of Ole Miss, Wallace's election in 1962, Birmingham, and Selma all occur after the Montgomery bus boycott, the sit-ins, the Freedom Rides, etc. He offers no way to distinguish the influence of *Brown* from that of these latter events. I have argued that these latter events, occurring in the southern apartheid system, and not *Brown*, led to the violent repression of Birmingham and Selma.²⁷ Klarman has plausibly argued that "*Brown* produced a southern political climate in which racial extremism flourished,"²⁸ but that does not support his conclusion of nontrivial causal influence for *Brown*. He has not shown that violence would have been absent without *Brown*. The evidence suggests that violence came quickly and often when blacks took the movement to the streets.

Like many before him, Klarman has striven mightily to find a central role for the Court in producing significant social reform.²⁹ Yet surprisingly, Klarman himself admits that the chain of causation created by *Brown* was "strikingly indirect, and indeed almost perverse."³⁰ The lesson of Klarman's analysis of *Brown* is that the Court can be used to create opposition in the hope that it behaves so badly as to sway the public in one's favor. Even if Klarman is

²⁷ Note, too, that the violence that caused the national revulsion did not occur until the 1960s, at least six years after *Brown*. The violence at Birmingham and Selma, identified by Klarman as well as others as key events, occurred in 1963 and 1965, nine and eleven years after *Brown* respectively. It is difficult to see how the immediate move to the right after *Brown* that Klarman notes drove these events. Rather, it seems more plausible that the demonstrations themselves, as well as the earlier actions of the movement, in the context of an apartheid system, created violent resistance.

²⁸ Klarman, *supra* note 2, at 117.

²⁹ Citations are legion. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (asserting that the role of the courts in social progress, though problematic, is central and necessary to that progress); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) (asserting that the Court, through structural reform, gives character to public values); Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* (1982) (discussing debate over whether the court plays too large a role in creating public policy); Victor Yannacone, *Discussion, in Law and the Environment* (Malcolm F. Baldwin and James K. Page, Jr., eds., 1970) (assessing problems faced in environmental practice and proposing needed changes in court procedure for successful environmental policymaking); Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* (1976) (detailing history of public interest law and asserting need for funding public practice so that social change can occur through the court system).

³⁰ Klarman, *supra* note 2, at 76.

right in his causal attribution, this is an uncontrollable and dangerous way to bring about change. It is akin to arguing in favor of a self-inflicted wound on the ground that if you survive, sympathy will flow to you. Would any responsible lawyer recommend such a strategy?³¹

The bizarre nature of Klarman's causal argument raises the question of why he has engaged in this prodigious effort to find, at best, a complicated and tortuous causal connection. Why is defending the efficacy of *Brown* so important? The answer, I think, is that *Brown* is the symbol of the use of courts to produce significant social reform.³² It provides legitimacy and a sense of purpose to liberal-leaning legal academics. Noble as this quest may be, it can not be undertaken in isolation from broader societal forces. Although more careful and thoughtful than most, Klarman's analysis is unpersuasive because, in the end, it focuses too closely on the Court and not closely enough on the society in which the Court operates. *Brown* is without doubt one of the Court's greatest decisions, but this does not mean it helped very much to further the cause of civil rights.

³¹ This assumes, of course, that you win the case!

³² In addition to the sources cited by Klarman, *supra* note 2, at 8 n.2, see Robert L. Carter, *The Warren Court and Desegregation*, 67 Mich. L. Rev. 237, 237 (1968) (calling *Brown* a "revolutionary statement of race relations law"); Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 Yale L. J. 1520, 1522 (1968) (asserting that *Brown* "profoundly affected national thinking and has served as the principal ideological engine" of the civil rights movement); Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 Record of the Ass'n of the Bar of the City of New York 320, 331 (1974) (calling *Brown* the "principal inspiration to others who seek change through litigation"); Richard Kluger, *Simple Justice* 710 (1976) (asserting that *Brown* was "nothing short of a reconsecration of American ideals"); Aryeh Neier, *supra* note 29, at 57 (calling *Brown* the "symbol" of the Court's ability to produce significant social reform).

